In the United States Circuit Court of Appeals for the Ninth Circuit

TACOMA RAILWAY AND POWER COMPANY, a corporation,
Plaintiff in Error,

vs.

WILLIAM COTHARY and MARGARET COTHARY, husband and wife,
Defendants in Error.

No. 2736.

PLAINTIFF'S IN ERROR ANSWER BRIEF ON MOTION TO AFFIRM.

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ARGUMENT

Defendants in error's motion to affirm, and for damages, is based upon the theory that the writ of error sued out in this cause was for delay only, and that the assignments of error are frivolous.

The motion seems to be based entirely upon the fact that the writ of error was not sued out within a few days after the trial of the case. The transcript of the record on file in this case shows that the verdict was returned June 11th, 1915, and judgment entered thereon June 14th, 1915. The transcript of record was filed in this Honorable Court January 15th, 1916,—several weeks prior to the time during which plaintiff in error had a right to file its petition for the writ of error. Certainly this cannot be considered by the Court as showing any disposition to delay the case. We call the Court's attention further to the fact that the proposed bill of exceptions was filed September 28th, 1915, and defendants in error filed amendments to the proposed bill of exceptions, nearly as large as the proposed bill of plaintiff in error, and the same was not finally settled, owing altogether to the attitude of defendants in error in settling the same, until December 28th, 1915. The writ of error was then filed, and a transcript of record ordered printed by the Clerk of this Honorable Court.

This case is now ready for argument in the May term of this Court, and could not have been set for argument during the last term. Certainly no claim that plaintiff in error attempted to delay this case can be based upon the record, which shows that in every instance the necessary proceedings

for obtaining a rehearing of this case by writ of error were taken well within the time provided therefor by law. They state in their argument upon the motion that "each step taken was taken upon the last day of grace in each instance." The rules of Court upon which this motion is based certainly do not contemplate a motion to dismiss when that is the only argument set forth as grounds therefor.

The second grounds for motion is that the three assignments of error are frivolous and require an affirmance of the judgment. We call the Court's attention to the fact that this case was tried in the State Court, and the trial judge held that under the laws of this State there could be no recovery, whereupon the plaintiffs started this action again in the United States District Court, for the Western District of Washington. We made a motion for a directed verdict upon the trial, which was denied. We believe that there is ample testimony in this case which will satisfy the Court that the plaintiff was a mere licensee at the place of the accident and was guilty of contributory negligence of the grossest kind, and that a directed verdict should have been granted as requested. It would require a discussion of all of the testimony in this case as to the merits which cannot be presented upon a motion of this character.

The Court also admitted testimony of a witness as to the condition of the turnstile in controversy one week after the accident, without any evidence whatever to show that the turnstile was in the same condition on the day of the accident, and other testimony showed that the turnstile was being used by passengers from cars of plaintiff in error during the day. We will cite cases to the Court which sustain our contention in this respect. This is a matter which we think upon the bare statement of the question involved will satisfy the Court that the point involved should be submitted to them, and the authorities sustaining position of plaintiff in error brought to the Court's attention.

The third assignment of error is that the Court permitted the defendants in error to read the testimony of one of plaintiff in error's witnesses on a former trial, without laying any grounds for impeachment questions. The brief on this motion by defendants in error relative to this point contains a very garbled statement of but part of the testimony. It is one of the elementary rules of evidence that it is necessary to lay proper grounds before impeaching questions can be asked; this was not done or attempted to be done in any manner required by law. This is not a frivolous assignment, and will be brought to the Court's attention by the proper authorities sustaining this assignment of error.

The Supreme Court of the United States has held in many cases that it is not proper on motion to dismiss an appeal or to affirm a judgment to decide what questions may be involved on the hearing of the appeal, and that "questions of reversal or affirmance appertaining to the merits of a controversey will not be determined on the motion to dismiss the appeal."

Hill vs. Chicago & E. R. Co., 129 U. S. 170;
Bohanan vs. Nebraska, 118 U. S. 231;
New Orleans and O. & G. W. R. Co., vs. Morgan, 10th Wall. 256.

The cases cited in defendants in error's brief fail to support their contentions in this case. The facts in this case are that the assignments of error are meritorious and a brief in support of the writ of error will be filed shortly with the Clerk of this Honorable Court. The defendants in error ask the Court in this case to go through the entire record to determine the merits thereof upon this motion which, if permitted to prevail, would deny every plaintiff in error the right to present its assignments of error to this Court in anything like a satisfactory manner, and without an opportunity to cite any authorities in support of its contentions.

We call the Court's attention to subdivision 5 of Rule No. 6 of the Supreme Court of the United States, where it says that in order to entertain a motion of the kind made by plaintiff in error in

this case it must be "*manifest* that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depends are so frivolous as not to need further argument." The assignments of error in this case certainly cannot be considered as the kind contemplated by this rule. We therefore pray the Court to deny the motion herein presented by defendant in error.

Respectfully submitted,

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